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No. 01-493

Supreme Court, U.S.
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In The

Supreme Court of the United States

FRANKLIN SEXTON,
Petitioner,

v.

CHINO VALLEY INDEPENDENT FIRE DISTRICT, RAY O. SHACKLEFORD, as an individual and in his official capacity as District Fire Chief; AL GRAMS, as an individual and in his official capacity as District Fire Chief; SOUTHERN CALIFORNIA RISK MANAGEMENT ASSOCIATES, INC., a California Corporation and public entity insurance carrier,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS CHINO VALLEY INDEPENDENT FIRE DISTRICT and AL GRAMS

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EDITOR'S NOTE

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QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court should depart from well-established precedent and abandon the "public concern" threshold of the *Pickering-Connick* balancing test for determining when a public employee may pursue a federal civil rights action against his employer.

II. Whether this Court should create and adopt a modified standard which would allow the Petitioner to maintain his employment discrimination action as a federal civil rights action.

III. Whether a malicious prosecution or abuse of process claim may be maintained as a substantive due process violation pursuant to 42 U.S.C. § 1983 where, as here, the alleged constitutional violations have been found untenable as a matter of law.

PARTIES TO THE PROCEEDING

Petitioner: Franklin Sexton

Respondents: Chino Valley Independent Fire District; Ray O. Shackleford, an individual and in his official capacity as District Fire Chief; Al Grams, as an individual and in his official capacity as District Fire Chief; and Southern California Risk Management Associates, Inc., a California Corporation and public entity insurance carrier

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Chino Valley Independent Fire District and Al Grams hereby oppose Franklin Sexton's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

Respondents Chino Valley Independent Fire District and Al Grams agree that the opinions and orders attached to Petitioner's Brief in Appendices A through J constitute the proper opinions and orders in this proceeding.

JURISDICTION

Respondents Chino Valley Independent Fire District and Al Grams agree with the Statement of Jurisdiction set forth by Petitioner.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment I

42 U.S.C. § 1983

California Labor Code § 3212

All Constitutional and statutory provisions are cited verbatim in Appendix A to this Brief.

STATEMENT OF THE CASE

This proceeding involves an employment dispute between petitioner Franklin Sexton and respondent Chino Valley Independent Fire District (hereinafter the "Fire Department"). Sexton has previously sued his employer (the Fire Department's predecessor), been compensated $250,000 for his claimed injury, and been reinstated to his

former position. He claims the Fire Department put him on temporary disability on the pretext that he suffered from a heart condition in retaliation for his prior lawsuit. (In the prior lawsuit Petitioner claimed his employer ***caused*** the heart condition). This he alleges violated his First Amendment rights, giving rise to 42 U.S.C. § 1983 claims and claims for malicious prosecution and abuse of process.

The District Court held that Petitioner's claims sought only redress for his personal grievances and thus did not meet the "public concern" threshold requirement to maintain civil rights claims against a public employer. The court further held that the malicious prosecution and abuse of process claims could not stand in the absence of constitutional violations. The District Court's ruling was based on well-established and controlling precedent, including this Court's decisions in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 137 (1983).[1] The District Court granted summary judgment against Petitioner on all claims and the Ninth Circuit Court of Appeals affirmed.

Petitioner now asks this Court to abandon the well-established and controlling precedent, and create entirely new law or to apply existing law in a tortured manner which would enable him to pursue his private grievances as a civil rights violation.

STATEMENT OF FACTS

The length and detail of the statement of facts offered by Petitioner are unwarranted, and the facts set forth in the Petition are misleading. The facts necessary to the resolution of the issues now before this Court follow.

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[1] The holdings of these two cases have become known as the *Pickering-Connick* test.

1. The Prior Action (*Sexton I*)

Petitioner Franklin Sexton is a firefighter. Beginning in 1991, Petitioner had a number of routine medical tests which revealed that he experienced irregular heartbeats. Pursuant to *California Labor Code* § 3212, there is a rebuttable presumption that a heart condition in a firefighter is work-related. Following the discovery of his condition, Petitioner was variously confined to light duty, placed on job-related disability status and temporarily taken off street duty to obtain counseling. Petitioner sued his employer claiming, *inter alia*, that his employment "caused" his heart condition (*Sexton I*). That action was settled for payment of $250,000 to Petitioner and, after obtaining medical clearance, he was restored to his position. In the interim, Petitioner had also received maximum State Workers' Compensation benefits, declining to challenge the diagnosis of disability before the California Workers' Compensation Appeals Board.

2. The Filing of *Sexton II*

Petitioner initiated this action on June 5, 1995. Some 20 months later he filed his Fourth Amended and Supplemental Complaint. In that pleading he alleged he ***never*** had a disabling heart condition, and that he was placed on disability in retaliation for the filing of *Sexton I*. He asserted claims for violation of procedural due process, substantive due process, for retaliation based on the exercise of freedom of speech and the right to petition, and for malicious prosecution and abuse of process.

3. The Rulings of the District Court and the Ninth Circuit Court of Appeals

Respondents filed a series of motions for summary adjudication of Petitioner's claims, which ultimately resulted in the entry of judgment against Petitioner on all claims on September 2, 2000.

As to Petitioner's Free Speech claim, the District Court held that *Connick v. Myers*, 461 U.S. 138 (1983) was dispositive because "a public employee's speech must pertain to a matter of public concern." [Petitioner's Appendix F, p. 23a] The Court also ruled that the Petition Clause claim also failed because Petitioner sought redress only for his personal grievances, not a matter of public concern as required by *Rendish v. City of Tacoma*, 123 F.3d 1216, 1220 (9th Cir. 1997). [Petitioner's Appendix F, p. 23a] The District Court reduced the case to its essence and held: "Plaintiff has alleged he was wrongfully put on disability due, interalia, to Defendants' encouraging Dr. Markovitz to change his evaluation. These are private matters which do not rise to the level of 'broader societal concern' required to constitute public speech." [Petitioner's Appendix F, p. 23b]

The District Court further ruled that the malicious prosecution and abuse of process claims were not cognizable under 42. U.S.C. § 1983 because Petitioner was not deprived of a constitutional right by his employer. [Petitioner's Appendix H, pp. 35a-36a] In reaching this conclusion, the Court expressly rejected the applicability of *Albright v. Oliver*, 510 U.S. 266 (1994), the primary case on which Petitioner has relied in support of his claim. [Petitioner's Appendix H, pp. 35a-36a]

Petitioner sought review from the Ninth Circuit Court of Appeals, which denied the petition for rehearing without opinion, en banc, on June 22, 2001.

REASONS TO DENY THE WRIT

I. PETITIONER HAS NOT ESTABLISHED THAT REVIEW BY THIS COURT IS WARRANTED

Petitioner urges review on essentially three bases: (1) the issues raised by his Petition present novel questions; (2) there is a claimed "split of authority among the various circuits;" and (3) the lower courts were just wrong. As set forth below, however, none of these bases has merit and the Petition should be denied in its entirety.

Petitioner suggests that this case presents a novel factual scenario in that it involves speech that was both not of public concern and nondisruptive, and suggests that it warrants special treatment. This Court, however, has already provided for such a circumstance. *Pickering v. Board of Education,* 391 U.S. 563 (1963) makes it clear that if the speech at issue is not of public concern, ***then no further inquiry is made*** – *i.e.,* whether speech is nondisruptive is irrelevant if the public concern threshold is not met. *Connick* affirmed that "public concern" is a prerequisite: "*Pickering,* its antecedents and progeny, lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, ***it is unnecessary for us to scrutinize the reasons for her discharge.***" *Connick, supra,* 461 at 146. (Emphasis added.) Petitioner has conceded that the speech which forms the basis of his claims does not satisfy the "public concern" requirement. Thus, contrary to his assertion, this case does not present novel facts which warrant special treatment.

Petitioner also urges this Court to issue a writ of certiorari to resolve a split of authority among the various federal circuits. It is true that there is not absolute uniformity on the issue of whether "public concern" is also a requirement before a plaintiff can maintain a 42 U.S.C. § 1983 action based on the Petition Clause of the First Amendment. Standing alone in this regard, however, is the Third Circuit in its opinion *San Fillippo v. Bongionvanni,* 30 F.3d 424 (3rd Cir. 1994). It should be noted that this Court denied cert. of that case. *See,* 513 U.S. 1082 (1995). As Petitioner concedes, all other circuits which have considered the issue have ruled contrary to his position. *See, e.g., White Plains Towing Corp. v. Patterson,* 991 F.2d 1049 92d Cir. 1993); *Day v. South Park Independent School District,* 768 F.2d 696 (5th Cir. 1985); *Valot v. Southeast Local School District Board of Education,* 107 F.3d 1220 (6th Cir. 1997); *Zorzi v. County of Putnam,* 30 F.3d 885, 896 (7th Cir. 1994) ("If a public employee is retaliated against for filing a lawsuit, the public employee has no First Amendment claim unless the lawsuit

involves a matter of public concern."); *Rendish v. City of Tacoma*, 123 F.3d 1216 (9th Cir. 1997); *Grabow v. Independent School District No. I-008*, 86 F.3d 1166 (10th Cir. 1996) (unpublished; citation permissible under 10th Cir. rules); and *Renfroe v. Kirkpatrick*, 772 F.2d 714 (11th Cir. 1984) *cert denied*, 469 U.S. 823 (1984).

The Third Circuit's opinion in *San Filippo* has been roundly criticized. As the Ninth Circuit Court of Appeals noted in *Rendish v. City of Tacoma*: "We respectfully disagree with the Third Circuit's analysis.. . . It diverges from the Supreme Court's teachings that the primary function of the First Amendment is to facilitate participation in a free political process and that the First Amendment extends its guarantees to public employees in order to encourage such participation." *Rendish v. City of Tacoma, supra*, 123 F.3d at 1223.

Respondents submit that the existence of one anomalous opinion should not warrant review of a ruling consistent with Supreme Court precedent as well as that of all other circuits.

Last, Petitioner argues essentially, that the lower courts were just wrong. As set forth below, the opinion of the District Court (affirmed en banc by the Court of Appeals) was based on controlling precedent and supported with sound rationale.

II. THIS COURT SHOULD DECLINE PETITIONER'S INVITATION TO ABANDON THE WELL-ESTABLISHED *PICKERING-CONNICK* TEST

Having conceded the subject speech is not of public concern, Petitioner urges a departure from the well-establish and controlling precedent of *Pickering* and *Connick* and their progeny. No reason for such a departure exists.

In 1968 this Court held in *Pickering v. Board of Education*, 391 U.S. 563 (1968) that a public employee could not be discharged for making comments on issues of public importance. Fifteen years later, in *Connick v. Myers*, 461 U.S. 138, this Court relied heavily on the rationale set forth by

Pickering, and noted, "Our cases following *Pickering* ***also involved safeguarding speech on matters of public concern.***" *Connick, supra,* 461 U.S. at 145 (emphasis added.) The emphasis on the "public concern" element cannot be overstated. In *Connick*, this Court also held:

> The repeated emphasis in *Pickering* on the right of a public employee "as a citizen, in commenting upon matter of public concern," was not accidental. This language, reiterated in all of *Pickering's* progeny, reflects both the historical evolvement of the rights of public employees, and the common sense realization that ***government offices could not function if every employment decision became a constitutional matter.***

Connick, supra, 461 U.S. at 143 (emphasis added; footnotes omitted). Based on the ruling and rationale of *Pickering*, the *Connick* Court concluded:

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.

Connick, supra, 461 U.S. at 146.

Both *Pickering* and *Connick* involved the Free Speech Clause of the First Amendment. In *Rendish v. City of Tacoma,* 123 F.3d 1216 (9th Cir. 1997), the Court of Appeals considered whether the ruling and rationale of *Pickering* and *Connick* would apply to a similar claim based on a claimed violation of the Petition Clause of the First Amendment. In its lengthy opinion, the *Rendish* court explained the issue and its holding:

In *Gearhart v. Thorne*, 768 F.2d 1072, 1073 (9th Cir. 1985), we considered a public employee's section 1983 claim alleging that his employer retaliated against him for using internal grievance procedures. Analyzing this claim primarily as one involving speech, we followed *Connick* and held that the First Amendment did not protect "a public employee's right to speak internally about matters of purely personal interest." *Id.* . . . Although we recognized that the First Amendment protects both the right to petition and the right of public employees to speak out on public issues, we . . . did not specifically address . . . whether the public concern requirement applies to action protected by the Petition Clause. *Id.* We have subsequently held in a section 1983 retaliation claim outside the public-employment context that "[t]he right of access to the courts is subsumed under the first amendment right to petition the government for redress of grievances." *Sorrano's Gasco [Inc. v. Morgan*, 874 F.2d 1310 (9th Cir. 1989)] at 1314. ***We now extend our holding in Gearhart to a public employee's litigation, which is independently protected by the Petition Clause. We hold that a public employee's litigation must involve a matter of public concern in order to be protected by either the Petition Clause of the Speech Clause or the First Amendment.***

Rendish, supra, 123 F.3d at 1220 (emphasis added). In reaching this conclusion, the court relied on Supreme Court precedent such as *McDonald v. Smith,* 472 U.S. 479 (1985) in which this Court acknowledged the close association between the Free Speech and Petition Clauses of the First Amendment:

> The Petition Clause . . . was inspired by the same ideal of liberty and democracy that gives us the freedoms to speak, publish, and assemble. These First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional protection to statement made in a petition . . . than other First Amendment expressions.

Rendish, supra, 123 F.3d at 1220-1221, citing *McDonald v. Smith,* 472 U.S. 497, 482 (1985).

Despite this overwhelming authority, Petitioner urges this Court to create new law so that he may have an additional recovery from respondents arising from his ***personal*** workplace grievances. Petitioner, however, provides no persuasive reasons for this Court to reverse the holdings of *Pickering* and *Connick* and their progeny.

III. THIS COURT SHOULD LIKEWISE REFUSE TO CREATE A SPECIAL MODIFICATION OF THE *PICKERING-CONNICK* TEST

In the alternative, Petitioner asks this Court to create a special modification of the *Pickering-Connick* test which would allow him to pursue his action against respondents. Petitioner suggests that this Court could "afford[] blanket constitutional protection . . for civil litigation only, perhaps limiting it to federal litigation and/or actions seeking vindication of any constitutional or civil right, so long as the activity in issue remained exclusively involved in solely those activities

connected with the litigation itself." [Petition, p. 19] While it is clear that such a rule would benefit Petitioner, it is not clear how such a rule would foster the concerns raised by this Court in *Pickering, Connick* and *McDonald,* and their progeny.

As previously discussed, this Court's position is clear, and with the exception of one anomalous third circuit opinion, has been consistently followed. The proposed modification finds no support in the spirit or the letter of this overwhelming and controlling authority.

IV. THIS COURT SHOULD NOT CREATE NEW LAW TO ALLOW PETITIONER TO PURSUE HIS MALICIOUS PROSECUTION AND ABUSE OF PROCESS CLAIMS

Petitioner also asks this Court to vitiate the requirement that a malicious prosecution or abuse of process claim must be founded on a constitutional violation in order to be actionable under 42 U.S.C. § 1983. Again, however, he has offered no persuasive rationale for the requested departure from well-established precedent.

In California, the essential elements of the tort of malicious prosecution are: (1) the action was commenced by or at the direction of the defendant; (2) the action was brought without probable cause; (3) the action was initiated with malice; and (4) the action was terminated in the plaintiff's favor. *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50; *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 871-872. Such actions are not favored in the law. *Id.* at 872-873.

There are additional federal requirements if the claim is brought pursuant to 42 U.S.C. § 1983:

> In [the Ninth C]ircuit, the general rule is that a claim of malicious prosecution is not cognizable under 42 U.S.C. § 1983 if the process is available within the state judicial system to provide a remedy. *Bretz v. Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985) (en banc); *Cline v. Brusset*, 661 F.2d 108, 112 (9th Cir. 1981). However, "an exception exists to the general rule when a malicious prosecution is conducted with the intent to deprive a person of equal protection of the laws or is otherwise intended to subject a person to a denial of constitutional rights." *Bretz*, 773 F.2d at 1031; *Cline*, 661 F.2d at 112.

Usher v. City of Los Angeles, 828 F.2d 556, 561-562. In other words, a malicious prosecution claim is not actionable under section 1983 unless there is an attendant violation of a constitutional right. Once the District Court ruled against Petitioner as a matter of law on his First Amendments claims, a ruling that the malicious prosecution claim was untenable necessarily followed.

The same rationale applied to Petitoner's abuse of process claim. The essential elements of an abuse of process claim in California are: (1) the ulterior motive or purpose of the defendant in using the process and (2) the wrongful act, *i.e.*, use of the process in an improper manner. *Pimentel v. Houk* (1951) 101 Cal.App.2d 884, 887; *Tellefsen v. Key System Transit Lines* (1961) 198 Cal.App.2d 611, 614.

The District Court relied on *Cameo Convalescent Center, Inc. v. Senn*, 738 F.2d 836, 845 (7th Cir. 1978) in concluding that Petitioner's abuse of process claim also failed because it was not based on a constitutional violation. [Petitioner's Appendix H, pp. 37a-38a] In *Cameo*, the court held:

> Whether abuse of legal process or malicious prosecution rises to the level of a constitutional violation actionable under 42 U.S.C. § 1983 depends upon whether, "acting under color of state law, the defendant has subjected the plaintiff to a deprivation of constitutional magnitude." *Hampton v. Hanrahan*, 600 F.2d at 630. However, ***"conduct which merely engenders common law tort liability, without infringing on a constitutionally protected interest, is not a sufficient basis to support a cause of action under Section. 1983.*** *Beker Phosphate Corporation v. Muirhead*, 581 F.2d 1187, 1189 (5th Cir. 1978). ***"[T]he common law tort of misuse of legal procedure, without more, does not rise to the level of Constitutional wrong remedied by Section 1983."*** *Id.*

Cameo Convalescent Center, Inc. v. Senn, 738 F.2d 836, 845 (7th Cir. 1978) (emphases added.) In short, the District Court applied the same standard to the malicious prosecution and abuse of process claims, and in the absence of a viable constitutional violation, found they lacked merit as a matter of law.

As he did below, Petitioner relies heavily on *Albright v. Oliver*, 510 U.S. 266 (1994) in support of his argument that these claims should be maintainable based on allegations of "substantive due process." As the District Court found, however , this case is inapplicable because it arose from a criminal prosecution, and was factually driven. As with the First Amendment claims, the District Court's decision on the malicious prosecution and abuse of process claims was based on controlling legal precedent appropriately and correctly applied to the facts of this case. Review by the Court is not warranted.

CONCLUSION

Based on the foregoing, Respondents Chino Valley Independent Fire District and Al Grams respectfully submit that the Franklin Sexton's Petition for Writ of Certiorari should be denied in its entirety. Petitioner has had his day in court and has not shown further review is warranted.

Respectfully submitted,

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Constitution of the United States, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United State or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

California Labor Code § 3212:

> In the case of members of a sheriff's office, district attorney's staff of inspectors and investigators or of police or fire departments of cities, counties, cities and counties, districts or other public or municipal corporations or political subdivisions, whether such members are volunteer, partly paid, or fully paid, and in the case of active firefighting members of

the Department of Forestry and Fire Protection whose duties require firefighting or of any county forestry or firefighting department or unit, whether voluntary, fully paid, or partly paid, and in the case of members of the warden service of the Wildlife Protection Branch of the Department of Fish and Game whose principal duties consist of active law enforcement service, excepting those whose principal duties are clerical or otherwise do not clearly fall within the scope of active law enforcement service such as stenographer, telephone operators, and other officeworkers, the term "injury" as used in this act includes hernia when any part of the hernia develops or manifests itself during a period while such member is in the service in such office, staff, division, department or unit, and in the case of members of such fire departments, except those whose principal duties are clerical, such as stenographers, telephone operators and other officeworkers, and in the case of county forestry or firefighting departments, except those whose principal duties are clerical, such as stenographers, telephone operators and other officeworkers, and in the case of active firefighting members of the Department of Forestry and Fire Protection whose duties require firefighting, and in the case of members of the warden service of the Wildlife Protection Branch of the Department of Fish and Game whose principal duties consist of active law enforcement service, excepting those whose principal duties are clerical or otherwise do not clearly fall within the scope of active law enforcement service such as stenographer, telephone operators,

and other officeworkers, the term "injury" includes pneumonia and heart trouble which develops or manifests itself during a period while such member is in the service of such office, staff, department or unit. In the case of regular salaried county or city and county peace officers, the term "injury" also includes any hernia which manifests itself or develops during a period while the officer is in the service. The compensation which is awarded for such hernia, heart trouble or pneumonia shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by the workers' compensation laws of this state.

Such hernia, heart trouble or pneumonia so developing or manifesting itself in such cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with it. Such presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

Such hernia, heart trouble or pneumonia so developing or manifesting itself in such cases shall in no case be attributed to any disease existing prior to such development or manifestation.